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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ALICE M. SMITH

V.

CENTRA BENEFIT SERVICES, INC.

On Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit erred in determining that the District Court lacked jurisdiction over the Petitioner's disparate impact claim.

2. Whether, with regard to the Petitioner's disparate treatment claim, the Court of Appeals for the Fifth Circuit erred in determining that the Petitioner failed to produce evidence indicating the Respondent was motivated by discriminatory intent.

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IN THE SUPREME COURT OF THE UNITED STATES

ALICE M. SMITH, *Petitioner*

v.

CENTRA BENEFIT SERVICES, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Alice M. Smith, Petitioner, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinions of the District Court (App., *infra*, 1-16) and the Court of Appeals (App., *infra*, 18-22) are unreported.

JURISDICTION

The Court of Appeals entered its judgment on March 25, 1999 (App., *infra,* 18). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1994).

STATEMENT OF THE CASE

On March 22, 1996, the Petitioner, Alice M. Smith, filed a Charge of Discrimination with the United States Equal Employment Opportunity Commission alleging that the Respondent, Centra Benefit Services, Inc., had engaged in discriminatory conduct in the promotion of a less qualified applicant. Subsequently, on December 27, 1996, the Petitioner filed her original Complaint with the United States District Court for the Southern District of Mississippi; this Complaint, filed *pro se*, alleged that

the Respondent had engaged in discriminatory conduct. On April 23, 1997, the Petitioner amended her Complaint to include, among other things, a claim of disparate impact discrimination, by and through the Respondent's use of the Wonderlic test.

The Respondent filed a Motion for Summary Judgment on December 19, 1997. Subsequently, on March 16, 1998, the District Court granted summary judgment. On appeal, the Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court.

A. Disparate Treatment Claim

This case involves claims by the Petitioner of disparate treatment and disparate impact.[1] The Petitioner asserts in her disparate treatment claim

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[1] The Petitioner's claim of disparate impact is based upon the Respondent's use of the Wonderlic standardized test.

that the Respondent's failure to promote was based on race.[2] In addition, the Petitioner asserts that she was more qualified than the applicant ultimately chosen by the Respondent.

In response, the Respondent contends that the Petitioner was not promoted due to her lack of or deficient interpersonal skills.[3] The Respondent also provided inconsistent and conflicting statements as to what qualifications were examined in determining which applicant would be promoted.

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[2] The Petitioner is an African-American female.

[3] When an employer bases its reasoning for failure to promote on the complaining party's lack of or deficient interpersonal skills, such reasoning is subject to heightened scrutiny. *See Bruhwiler v. University of Tennessee*, 859 F.2d 419 (6th Cir. 1988); *Sweeney v. Board of Trustees of Keene State College*, 604 F.2d 106 (1st Cir. 1979).

B. Disparate Impact Claim

The Petitioner asserts that the Respondent's use of the Wonderlic test[4] resulted in an adverse impact on her employment opportunities.[5] Although not specifically mentioned in the Petitioner's Charge of Discrimination filed with the United States Equal Employment Opportunity Commission[6] (also referred to as "EEOC"), the Petitioner asserts that this claim was "reasonably related"[7] to the EEOC Charge, and

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[4] The use of this test was previously determined to be discriminatory. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

[5] The Petitioner further asserts that the Respondent failed to properly validate its use of the Wonderlic test and that the use of such test was improper in that it tainted the applicant pool and applicant flow.

[6] At the time of the filing of the Charge of Discrimination, the Petitioner had been unable to ascertain the assistance of legal counsel.

[7] *See Gomes v. Avco*, 964 F.2d 1330 (2d Cir. 1992).

that an EEOC investigation could reasonably be expected to grow out of the Charge.[8]

The Respondent contends that the Petitioner's disparate impact claim is not sufficiently related to the EEOC Charge and, therefore, an EEOC investigation could not reasonably be expected to grow from such Charge. As such, the Respondent contends that the Petitioner may not bring her disparate impact claim due to the purported failure to exhaust administrative remedies before the EEOC.

C. Proceedings Below

In an Opinion and Order dated March 16, 1998, the District Court granted the Respondent's Motion for Summary Judgment (App., *infra*, 16).

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[8] *See Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970)

Although concluding that the Petitioner had established a prima facie case of discrimination based upon the Respondent's failure to promote, the District Court determined that the Petitioner had failed to submit sufficient evidence to create a reasonable inference that the Respondent's proffered reason for failure to promote was pretextual.[9] The District Court also concluded that it did not possess jurisdiction over the Petitioner's disparate impact claim; this conclusion was based upon the District Court's position that the Petitioner's disparate

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[9] As stated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), once a plaintiff has established a prima facie case of discrimination, the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the challenged employment action. If the defendant comes forward with a legitimate reason for the challenged action, the plaintiff must produce evidence sufficient to create a reasonable inference of pretext. *McDonnell Douglas,* 411 U.S. at 803.

impact claim was not "reasonably related" to the EEOC Charge, and was not "reasonably related" to the disparate treatment claim.

Upon appeal to the Court of Appeals for the Fifth Circuit, the Petitioner asserted that the District Court's grant of summary judgment was in error. As to her disparate treatment claim, several reasons were articulated by the Petitioner in support of this assertion. First, the Petitioner pointed out that the District Court failed to subject the Respondent's proffered reasoning for failure to promote to a heightened level of scrutiny.[10] This was so even

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[10] *See Bruhwiler*, 859 F.2d at 420; *Sweeney*, 604 F.2d at 108. In *Bruhwiler*, the Court of Appeals for the Sixth Circuit determined that when an employer bases their reason for failure to promote on the complaining party's lack of or deficient interpersonal skills, such proffered reason is subject to heightened scrutiny. *Bruhwiler*, 859 F.2d at 420. As well, in *Sweeney*, the Court of Appeals for the First Circuit also articulated a heightened level of

though the Respondent's proffered reasoning for failure to promote was based on the Petitioner's purported lack of or deficient interpersonal skills.[11] Second, the Petitioner showed that the Respondent had provided contradictory and inconsistent statements as to what qualifications or considerations were examined in determining which applicant would be selected for the subject promotion.[12] Third, the Petitioner asserted that genuine issues of material fact existed, thus, precluding the granting of

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examination. *Sweeney*, 604 F.2d at 108.

[11] The Respondent claims that the Petitioner possesses deficient leadership and communication skills.

[12] *See Edwards v. United States Postal Serv.*, 909 F.2d 320 (8th Cir. 1990) (holding that inconsistent and contradictory explanations concerning the criteria and basis for failure to promote reveal pretext).

summary judgment.[13]

As to her disparate impact claim, the Petitioner asserted that the District Court erred in its granting of summary judgment in that such claim was "reasonably related" to the allegations contained in the EEOC Charge, and that an EEOC investigation could have been expected to grow out of the EEOC Charge or the response by the Respondent thereto.[14]

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[13] A material fact is considered a "genuine issue" in four instances: 1) diametrically opposed facts or testimony, 2) multiple interpretations of undisputed testimony, 3) where materially differing, but nevertheless reasonable inferences may be drawn from the uncontradicted evidentiary facts, or 4) where the purported establishment of facts has been sufficiently incomplete or inadequate. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

[14] The EEOC is authorized to investigate and pursue other discriminatory practices, though not specifically alleged in the Charge. *See Equal Employment Opportunity Comm'n v. General Elec. Co.*, 532 F.2d 359 (4th Cir. 1976) (holding that if during an EEOC investigation such investigation

The Petitioner also asserted that due to her *pro se* status the EEOC Charge should have been construed in a liberal manner.[15] The Petitioner asserted that the District Court failed to liberally interpret her EEOC Charge to include such disparate impact claim, as well as improperly concluded that the disparate

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uncovers facts which support a charge of another type or additional discrimination, the EEOC may not cast a blind eye); *Joslin Dry Goods Co. v. Equal Employment Opportunity Comm'n*, 483 F.2d 178 (10th Cir. 1973) (upholding the right of the EEOC to investigate an employer's hiring practices, although the subject Charge alleged discriminatory discharge).

[15] *See Lattimore v. Polaroid Corp.*, 99 F.3d 456 (1st Cir. 1996). In *Lattimore*, the Court of Appeals for the First Circuit determined that individuals not represented by counsel at the time of the filing of an EEOC Charge enjoy a more generous standard in determining whether or not the allegations contained in such Charge are sufficiently related to the allegations contained in the subsequent Complaint. *Lattimore*, 99 F.3d at 458. As well, the Court stated that a charging party is not required to set forth with "literal exactitude" all the facts and theories upon which the claim is based. *Id.*

impact claim was not "reasonably related" to the EEOC Charge.

The Court of Appeals for the Fifth Circuit, in its unpublished Opinion dated March 25, 1999 (App., *infra*, 18-22), affirmed the District Court's grant of summary judgment. The Court of Appeals determined that the Petitioner had failed to produce evidence indicating that the Respondent was motivated by discriminatory intent, as to the disparate treatment claim. The Court of Appeals also concluded that the Petitioner's disparate impact claim was not reasonably related to the allegations contained in the subject EEOC Charge.

REASONS FOR GRANTING THE PETITION

At the District Court and Court of Appeals levels, conflicting decisions are proliferating rapidly,

and the need for guidance from this Court is acute. This case is a timely and rare opportunity to provide that guidance. Moreover, the decision below is erroneous, and the issues that it addresses are important.

I. Petitioner's Disparate Impact Claim

The Court of Appeals for the Fifth Circuit determined that the Petitioner's disparate impact claim was not reasonably related to the EEOC Charge due to the Petitioner's failure to mention the Wonderlic test in such Charge (App., *infra*, 20). Thus, the Court of Appeals concluded that the Petitioner had not exhausted administrative remedies and, therefore, the District Court had no jurisdiction to consider the disparate impact claim.

Although the Petitioner concedes that no

mention was made of the Wonderlic test in her EEOC Charge, the Wonderlic test was indeed mentioned by the Respondent in response to such Charge (App., *infra*, 28-30). As indicated by its correspondence to the Petitioner, dated September 5, 1996 (App., *infra*, 28-30), the EEOC, during the course of the subsequent investigation, became aware of the Respondent's use of the Wonderlic test. Had the EEOC properly investigated the Wonderlic issue, it would have determined that the Respondent failed to have readily available a validity study or transportability study.[16] This is aside from the fact that the use of the Wonderlic test has been found to be

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[16] Due to its use of the Wonderlic test, the Respondent was required to have readily available a validity study or transportability study. *See* 29 C.F.R. pt. 1607 § 5(d) (1995).

discriminatory on numerous occasions.[17]

In *Equal Employment Opportunity Comm'n v. General Elec. Co.*, 532 F.2d 359 (4th Cir. 1976), the Court of Appeals for the Fourth Circuit determined that the EEOC, during an investigation, may not cast a blind eye to other discriminatory acts or practices uncovered during such investigation; this case was also cited with approval by this Court in *General Tel. Co. v. Equal Employment Opportunity Comm'n*, 446 U.S. 318 (1980). In *Joslin Dry Goods Co. v. Equal Employment Opportunity Comm'n*, 483 F.2d 178 (10th Cir. 1973), the Court of Appeals for the Tenth Circuit concluded that the EEOC is authorized to investigate other discriminatory practices or conduct, even though not specifically mentioned in the EEOC

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[17] *See Griggs*, 401 U.S. at 435; *see also Watkins v. Scott Paper Co.*, 530 F.2d 1159 (5th Cir. 1976).

Charge.

In the present case, the EEOC should have, at least minimally, investigated the Respondent's use of the Wonderlic test. Even though the EEOC failed to properly investigate the Respondent's use of the Wonderlic test, such inaction on the part of the EEOC should not act as a bar to the Petitioner's disparate impact claim. In *Meser v. Meno*, 130 F.3d 130 (5th Cir. 1997), the Court of the Appeals for the Fifth Circuit determined that additional or supporting documentation submitted to the EEOC acted to expand on allegations contained in an EEOC Charge. Nonetheless, the Court of Appeals for the Fifth Circuit now asserts that the Petitioner's disparate impact claim is not reasonably related to the allegations contained in the subject EEOC Charge since such was not specifically mentioned therein

(App., *infra*, 20, 23-24).

The Petitioner also asserts that due to her *pro se* status at the time of the filing of the EEOC Charge, the Court of Appeals for the Fifth Circuit should have construed the subject Charge in a liberal manner to include her disparate impact claim.[18] However, as stated by the Court of Appeals,

> Smith's EEOC charge did not mention Centra Benefit's use of the Wonderlic test or any other specific employment practice. Rather, her charge simply alleged that Centra Benefit promoted a less experienced white employee. Accordingly, we conclude that Smith's disparate impact claim is not reasonably related to her EEOC charge.

(App., *infra*, 20). In addition, when a charge of discrimination is general or open-ended, claims

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[18] *See Lattimore*, 99 F.3d at 457; *Price v. Southwestern Bell Tel. Co.*, 687 F.2d 74 (5th Cir. 1982).

should be liberally interpreted.[19] Thus, the Court of Appeals failed to interpret the Petitioner's Charge in a liberal manner and failed to expand on the allegations contained therein, in light of the fact that the EEOC possessed knowledge of the Respondent's use of the Wonderlic test.

The constrictive position taken by the Court of Appeals is in conflict with the positions taken by other Circuits. Such a constrictive position serves to circumvent the purpose and principal function of Title VII of the Civil Rights Act of 1964.[20] Therefore, the Petitioner respectfully requests this Court's assistance in resolving this matter.

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[19] *See Babrocky v. Jewel Food Co.*, 773 F.2d 857 (7th Cir. 1985) (holding that charges of a general nature are to be liberally construed, in order to prevent the frustration of the goals of Title VII).

[20] Codified at 42 U.S.C. § 2000e(1)-(17).

II. Petitioner's Disparate Treatment Claim

In affirming the District Court's granting of summary judgment as to the Petitioner's disparate treatment claim, the Court of Appeals for the Fifth Circuit determined that the Petitioner had failed to "point to any evidence indicating that Centra Benefit was motivated by discriminatory intent" (App., *infra*, 22). However, the Petitioner had in fact introduced evidence indicating that the Respondent's proffered reasoning for failure to promote was inconsistent and contradictory.[21] Once evidence was supplied

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[21] In rebutting the Petitioner's prima facie case of discrimination, the Respondent gave both inconsistent and contradictory statements as to what qualifications or considerations were examined in determining which applicant would be selected for the promotion to the Lead position. In response to the EEOC Charge and in a memorandum, dated April 22, 1996, the Respondent stated that the Wonderlic test was used to assist in the selection of the applicant for the subject promotion. As well, the Petitioner contends that management stated that the

that the Respondent's stated reasons for failure to promote were inconsistent and contradictory, pretext should have been presumed.[22]

In *Edwards v. United States Postal Serv.*, the Court of Appeals for the Eighth Circuit determined that the employer's explanation for the challenged action was merely a pretext for discrimination.[23] This determination was based on the employer's inconsistent and changing reasoning for such

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Wonderlic test was in fact used in determining the individual selected for the promotion.

On the other hand, while being deposed, via Fed. R. Civ. P. 30(b)(6), the Respondent stated that the Wonderlic test was not used in the selection of the applicant for the Lead position. In addition, the Petitioner's supervisor provided oral testimony that the Wonderlic test was not taken into consideration in determining which applicant would be promoted.

[22] *See Edwards*, 909 F.2d at 324.

[23] *Id.*

action.[24]

In the present case, based on the Respondent's inconsistent and contradictory statements, pretext should have been presumed. Nonetheless, the Court of Appeals determined that the Petitioner had not provided evidence indicating that the Respondent was motivated by discriminatory intent. This position is in direct contradiction to *Edwards*.[25]

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[24] The employer first stated that the plaintiff was not transferred to the subject position due to her work performance needing improvement, and because she had not been employed for a full year. *Id.* at 322. Next, while at an EEOC hearing, the employer stated that the plaintiff was an excellent employee and was qualified for the subject position. *Id.* However, the employer could not recall why it had earlier claimed the plaintiff had performed her work in a poor manner. Finally, during a deposition, the employer again gave a contradictory and internally inconsistent explanation for its decision. *Id.* at 324.

[25] 909 F.2d at 320.

The Respondent also contends that the Petitioner was not promoted due to her lack of or deficient interpersonal skills (App., *infra*, 33-35). In particular, the Respondent claimed that the Petitioner did not possess strong communication and leadership skills.

Once an employer bases their reason for failure to promote on the complaining party's lack of or deficient interpersonal skills, such proffered reason is subject to a heightened scrutiny examination.[26] However, as evidenced by its Opinion (App., *infra*, 18-22), the Court of Appeals wholly failed to examine the Respondent's proffered reasoning with heightened scrutiny; this failure on the part of the Court of Appeals does not comport

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[26] *See Bruhwiler*, 859 F.2d at 420; *Sweeney*, 604 F.2d 107.

with the decisions rendered by other Circuits.[27] Thus, the Court of Appeals failed to properly examine the Respondent's reason for failure to promote.

CONCLUSION

The decision rendered by the Court of Appeals for the Fifth Circuit is erroneous in that the Respondent's disparate impact claim is indeed "reasonably related" to the subject EEOC Charge. Due to the fact that the EEOC should have investigated the Respondent's use of the Wonderlic test, as well as the fact that the Petitioner was unrepresented by counsel at the time of the filing of the EEOC Charge, the Petitioner's disparate impact

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[27] *See Bruhwiler*, 859 F.2d at 419; *Sweeney*, 604 F.2d at 106.

claim should have been contained within her EEOC Charge.

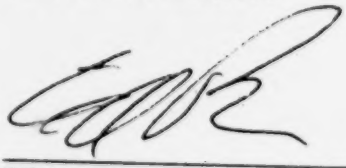
As to the Petitioner's disparate treatment claim, the Court of Appeals also erroneously affirmed the District Court's grant of summary judgment. Based on the Respondent's inconsistent and contradictory explanation for failure to promote, the Court of Appeals should have determined that such proffered explanation or reason was merely a pretext. In addition, once the Respondent articulated a reason based on lack of or deficient interpersonal skills, the Court of Appeals should have examined the Respondent's proffered reason with heightened scrutiny.

The decision rendered by the Court of Appeals is in conflict with the various decisions rendered by other Circuits. As well, the issues presented for

review by this Court are important to both the present Petitioner and other similarly situated individuals. Therefore, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ALICE M. SMITH

BY: 

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